

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BENNIE WALLACE,

Plaintiff,

v.

LOCKHEED MARTIN OPERATIONS  
SUPPORT, INC., a foreign  
corporation,

Defendant.

NO. CV-09-5049-EFS

**ORDER GRANTING AND DENYING IN  
PART DEFENDANT'S MOTION FOR  
PROTECTIVE ORDER**

Before the Court, without oral argument, is Defendant Lockheed Martin Operations Support, Inc.'s (LMOS) Motion for Protective Order (Ct. Rec. [39](#)), which asks the Court to enter a protective order controlling the designation and handling of documents during discovery and at trial. In particular, LMOS asks the Court to treat employee wage, job description, benefit, and performance appraisal information as confidential information, as well as LMOS policies regarding recruitment, equal employment opportunities, harassment, and ethics and business conduct. Plaintiff Bennie Wallace opposes the motion, contending that the requested protective order is too broad. The Court issued a tentative

1 Order on July 6, 2010 (Ct. Rec. [69](#)), limiting the protective order to  
2 include medical information, information subject to a legally-protected  
3 right of privacy, and salary and benefit information. In response, LMOS  
4 asks the Court to broaden the category of confidential information to  
5 include job description information, LMOS policies, and Ms. Wallace's  
6 personnel file and training records. (Ct. Rec. [70](#).) Upon review, the  
7 Court is fully informed and grants and denies LMOS's motion in part.

8 Under Federal Rule of Civil Procedure 26(c)(1),

9 [t]he court may, for good cause, issue an order to protect a  
10 party or person from annoyance, embarrassment, oppression, or  
undue burden or expense, including one or more of the  
11 following:

12 (G) requiring that a trade secret or other confidential  
research, development, or commercial information not be  
13 revealed or be revealed only in a specified way.

14 The court's protective order must "identify and discuss the factors it  
15 considered in its 'good cause' examination to allow appellate review of  
16 the exercise of its discretion." *Foltz v. State Farm Mut. Auto. Ins.*  
17 *Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (quoting *Phillips v. Gen.*  
18 *Motores*, 307 F.3d 1206, 1212 (9th Cir. 2002)). The party seeking the  
19 protective order has the burden of 1) making a "particular showing" that  
20 good cause supports entry of a protective order and 2) establishing that  
21 a "specific prejudice or harm will result if no protective order is  
22 granted." *Id.* at 1130-31.

23 LMOS maintains that it treats employee salary, benefit, personnel  
24 files, job descriptions, and lists and equal employment opportunities,  
25 recruitment, harassment-free workplace, and ethics and business conduct  
26 policies with confidentiality. LMOS's Document Control Manager Bruce  
Sullivan testified that LMOS zealously protects and treats as

1 confidential employee salary, benefit, and performance appraisal  
2 information by restricting access internally in order to insure privacy.  
3 (Ct. Rec. 46-2.) He also testified that job descriptions are stamped  
4 "business sensitive." He testified that this approach reduces the  
5 potential that competitors will acquire that information and thereby gain  
6 an advantage in the highly competitive world of bidding for multi-million  
7 dollar contracts at the Hanford Area site. In addition, this approach  
8 ensures that employee's privacy rights are protected.

9       Upon review, the Court modifies its tentative ruling, which  
10 encompassed employee salary and benefits, medical information, and  
11 information subject to a legally-protected right of privacy, to also  
12 include recruitment and ethics and business conduct policies. Public  
13 release of employee salary and benefit information and LMOS's recruitment  
14 and ethics and business conduct policies would potentially place LMOS at  
15 a competitive-bidding disadvantage. *See Peskoff v. Faber*, 230 F.R.D. 25,  
16 33 (D.C. Cir. 2005) (entering an order treating "any financial  
17 information of a party or protected person, including tax, salary, or  
18 bank account information, that, if disclosed, would prove materially  
19 damaging to that party's or person's reputation or invasive of his or her  
20 privacy" as confidential). However, the Court finds that public release  
21 of LMOS's equal employment opportunity or harassment policies will not  
22 place LMOS at a competitive-bidding disadvantage. LMOS is subject to  
23 state and federal laws that require it to have such policies, and the  
24 Court determines that these LMOS policies need not be treated  
25 confidentially. The Court also determines descriptions of job duties and  
26 qualifications need not be protected; LMOS itself must disclose such

1 information when it seeking to hire a new employee. Lastly, although  
2 information contained in a personnel file is typically treated as  
3 confidential information, Bennie Wallace has initiated this lawsuit  
4 claiming that LMOS's failure to promote her was based on gender  
5 discrimination; Ms. Wallace has thereby put her performance evaluations  
6 and training records at issue. *Cf. Pappas v. Holloway*, 114 Wn.2d 198,  
7 204 (1990) (recognizing that attorney-client privilege is waived if  
8 client sues prior attorney for malpractice); RCW 5.60.060(4) (providing  
9 that plaintiff who commences an action for personal injury waives the  
10 physician-patient privilege ninety days after filing the complaint).  
11 Accordingly, for purposes of this lawsuit, such information need not be  
12 treated confidentially.

13 Limiting the protective order as described ensures that it is not  
14 too broad, thereby protecting the public's First Amendment right to court  
15 information. It also permits Plaintiff to review such information  
16 produced in discovery with her attorney but, aside from a copy of her  
17 personnel file, she is not entitled to copies of LMOS's salary, benefit,  
18 recruitment policies, or ethics and business conduct policies produced  
19 in discovery. Finally, the Court modifies proposed paragraph 11 to  
20 require the parties to attempt to reach agreement first and, if unable  
21 to reach agreement, then to raise the issue in the Joint Pretrial Order.

22 Accordingly, **IT IS HEREBY ORDERED:** LMOS's Motion for Protective  
23 Order (**Ct. Rec. [39](#)**) is **GRANTED AND DENIED IN PART** as follows:

24 The provisions below control the designation and handling of  
25 documents and other information produced during the discovery of this  
26 litigation and at trial relating to LMOS employee salaries and benefits,

1 medical information, information subject to a legally-protected right of  
2 privacy, and LMOS recruitment and ethics and business conduct policies.

3 Documents either produced in discovery or used at trial that contain  
4 information regarding any of the above categorizes are considered  
5 confidential and proprietary.

6 1. This Protective Order shall govern the designation and handling  
7 of these protected documents and other information produced by any party  
8 in discovery in this litigation, whether by voluntary production or  
9 disclosure or in response to any formal discovery procedure, including  
10 designation and handling of nonpublic information of a confidential  
11 nature. This Protective Order does not affect any party's obligations  
12 under the Federal Rules of Civil Procedure to produce documents as  
13 required by the rules of discovery or Court order. The purpose of this  
14 Protective Order is to facilitate the handling of nonpublic information  
15 of a confidential or proprietary nature.

16 2. Standard for Protected Documents or Other Information: Any  
17 person who is required to produce documents or information in discovery  
18 in this litigation may designate material produced as a protected  
19 document(s) pursuant to this Protective Order. All designations must be  
20 based on counsel's good faith belief that the information falls within  
21 one of the following two categories of Protected documents:

22 a. "Confidential Information": any information, testimony,  
23 written response to discovery, document, or thing produced in connection  
24 with this litigation that is not in the public domain and is reasonably  
25 believed by the producing party to contain LMOS employee salaries and  
26 benefits, medical information, information subject to a legally-protected

1 right of privacy, or LMOS recruitment and ethics and business conduct  
2 policies.

3 b. "Attorney's Eyes Only Information": any information,  
4 testimony, written response to discovery, document, or thing produced in  
5 connection with this litigation that is not in the public domain and is  
6 reasonably believed by the producing party to contain employee salary or  
7 benefit information.

8 3. Protected Documents: Protected document(s) are those documents  
9 marked "CONFIDENTIAL" or "ATTORNEY'S EYES ONLY" by any party. These  
10 documents, referred to hereinafter as "protected documents," will be  
11 covered by this Protective Order and will be used only for the purposes  
12 of this case, and will not be used by any party or his or her counsel for  
13 any purpose unrelated to this case. Any person who is required to  
14 produce documents or information in discovery in this litigation may  
15 designate material produced as a protected document(s) pursuant to this  
16 Order.

17 4. Designating Protected Documents:

18 a. Marking Protected Documents: Protected documents shall  
19 be designated as either "Confidential" or "Attorneys Eyes Only" by  
20 affixing to them the appropriate legend in a size and location that makes  
21 the designation readily apparent, preferably in the lower right hand  
22 corner.

23 b. Designating Deposition Testimony: Any party or non-party  
24 wishing to designate deposition testimony or deposition exhibits as  
25 confidential may do so on the record during the deposition, or within 30  
26 days after receipt of the deposition transcript and exhibits by providing

1 written notice of the designation to the parties and any other affected  
2 person. The party making the designation shall be responsible for  
3 assuring that those portions of the deposition transcript and exhibits  
4 designated as confidential are appropriately bound by the reporter.

5 c. Subsequent Designation: A protected document produced or  
6 disclosed without a "CONFIDENTIAL" designation may be subsequently  
7 designated by any party as confidential. In each such case, the  
8 designating person shall provide to all other parties written notice of  
9 that designation and a copy of the document marked as "CONFIDENTIAL."  
10 No person shall be liable for publicly disclosing a document marked  
11 "CONFIDENTIAL" if that disclosure occurred prior to receipt of written  
12 notice pursuant to this paragraph.

13 5. Maintaining Designated Protected Documents or Other Protected  
14 Information: Any protected document or other protected information must  
15 be maintained in a manner reasonably calculated to preserve its  
16 confidentiality.

17 6. Disclosure of Protected Documents or Other Protected  
18 Information:

19 a. Except as set forth herein or by any subsequent Court  
20 order, no protected documents shall be delivered, exhibited, or disclosed  
21 to any persons unless done in a manner in compliance with this Protective  
22 Order.

23 b. The parties' counsel shall require all persons, except  
24 those referred to in paragraph 6c and 6d, before being given access to  
25 any protected document or other information, to read and agree to be  
26

1 bound by this Protective Order by endorsing the certification attached  
2 as Exhibit A. Counsel shall retain this certification.

3 c. "CONFIDENTIAL" documents or other information may be  
4 delivered, exhibited, or disclosed to the following persons subject to  
5 the limitations of this Protective Order:

6 i. Counsel representing the named parties in this case  
7 and any paralegal, clerical, or other employee of such counsel assisting  
8 in the prosecution or defense of this litigation;

9 ii. Any copying services hired by counsel to copy  
10 documents in bulk;

11 iii. The Court or any Court personnel subject to the  
12 limitations of paragraph 6 relating to filing of protected documents;

13 iv. Any person testifying or attending a deposition;

14 v. Any person identified as having authored or having  
15 previously received the protected document(s);

16 vi. The parties and their client representatives,  
17 insurance carriers, and/or counsel for their insurance carriers for any  
18 purpose in this litigation; and

19 vii. Former employees or agents.

20 d. "ATTORNEY'S EYES ONLY" documents and other information may  
21 be may be delivered, exhibited, or disclosed to the following persons  
22 subject to the limitations of this Protective Order. Disclosure under  
23 this paragraph shall not be deemed to waive any attorney-client privilege  
24 or work product immunity that may exist.

25 i. Counsel of record for the parties, and associate  
26 attorneys and paralegals and clerical employees assisting such counsel;



1           ii. Judges, magistrates, law clerks, and clerical  
2 personnel of the Court before which this action is pending when  
3 "ATTORNEY'S EYES ONLY" information is filed under seal, consistent with  
4 the Court's local rules;

5           iii. Consultants or experts, who are retained by either  
6 of the parties to consult or testify in this case, subject to the  
7 conditions set forth in Paragraph 6b, above;

8           iv. Employees and officers of the party producing the  
9 documents or information;

10           v. Authors or drafters of the documents or information;  
11 and

12           vi. Plaintiff, so long as she is viewing the document  
13 with counsel.

14           e. This Protective Order does not apply to information  
15 obtained by or made available to any such person by means other than the  
16 discovery provisions of the Federal Rules of Civil Procedure.

17           7. Filing of Protected Documents:

18           a. Filing under Seal: Any party seeking to file documents  
19 or other information (including deposition transcripts) previously marked  
20 as CONFIDENTIAL or "ATTORNEY'S EYES ONLY" under this Stipulated Motion  
21 will take all appropriate steps to obtain a court order sealing such  
22 material before publicly filing any documents previously marked as  
23 CONFIDENTIAL or "ATTORNEY'S EYES ONLY." The parties also agree to take  
24 all appropriate steps to protect the confidentiality of CONFIDENTIAL or  
25 "ATTORNEY'S EYES ONLY" information referenced in the pleadings.

1           b.    Failure to File under Seal:  If the filing party fails to  
2 file protected documents or information under seal, the producing party  
3 or any party claiming confidentiality can write to the filing party  
4 requesting that counsel take immediate steps to place the protected  
5 document or information under seal.  If the filing party fails to take  
6 corrective action within three calendar days of notification, the  
7 producing party may move the Court to request that the court place the  
8 protected documents or information under seal.  If the filing party was  
9 given proper notice, failed to take corrective action, and the producing  
10 party successfully intervenes to place the protected documents or  
11 information under seal, that producing party will be entitled to the  
12 costs and fees associated with filing the motion.

13           c.    Consent to File - Documents Not Filed Under Seal:  Any  
14 party may file documents marked CONFIDENTIAL or "ATTORNEY'S EYES ONLY"  
15 with the court without filing those documents under seal provided that  
16 the party, prior to filing such documents, obtains the written consent  
17 of the other parties.

18           8.    Producing Party's Use of Protected Documents:  Nothing in this  
19 Protective Order limits a producing party's use of its own documents or  
20 documents obtained through means other than discovery requests or  
21 subpoenas in this litigation.  Such disclosures shall not affect any  
22 confidential designation made under the terms of this Protective Order.

23           9.    Disputes as to Confidentiality Designation:

24           a.    Meet and Confer Requirement:  If, at any time, a party  
25 disagrees with the designation of a protected document, the parties must  
26 first attempt to resolve the dispute by conferring.

1           b.    Protective Order:  If the dispute is not resolved through  
2 the meet-and-confer process within 15 days of notification of the  
3 receiving party's disagreement with the designation, the producing party  
4 will have 30 days to move the court for protection under the Federal  
5 Rules of Civil Procedure.  The parties may, however, agree to extend this  
6 period in order to bring any disputes about designations of protected  
7 documents to the Court either at one time or in as efficient a manner as  
8 possible.

9           c.    Status Pending Resolution of Dispute:  Any disputed  
10 document or other material must be treated as a protected document under  
11 this Protective Order until entry of a court order ruling otherwise.

12          10.  Rights of Parties:  This Protective Order is without prejudice  
13 to the right of any party to apply to the Court for any further  
14 protective order relating to any confidential information or for an order  
15 permitting disclosure of any confidential information beyond the terms  
16 of this Protective Order.

17          11.  Documents for Trial:  Prior to the pretrial conference, the  
18 parties must meet and confer to (a) reach an agreement as to the  
19 confidentiality of information to be used at trial, and (b) designate  
20 documents as trial exhibits.  If the parties cannot reach agreement, they  
21 can request that the Court resolve the issue by raising it in their Joint  
22 Proposed Pretrial Order.  At the producing party's request, any document  
23 previously designated confidential must be used at trial only in a clean  
24 or redacted copy without any such designation.

25          12.  Upon Case Completion:  When this action, including entry of  
26 judgment or appeal, concludes and within 60 days after the litigation has

1 been finally terminated, a producing party may request the return or  
2 destruction of all protected documents produced in this litigation,  
3 except those filed with the Court or agreed by the parties to be retained  
4 for purposes of effectuating any judgment. If such a request is made in  
5 writing, the recipient of the request will have 60 days in which to (a)  
6 return the documents, (b) destroy the documents, or (c) file a motion  
7 with the Court seeking an order upon good cause shown that documents  
8 should not be destroyed or returned. Even if there is no request to  
9 return the documents within the 60 days, the protected documents are  
10 still subject to the terms of this Protective Order.

11 13. Commencement: It is ordered that counsel will abide by the  
12 terms of this Stipulated Protective Order immediately upon entry of this  
13 Order.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
15 this Order and to provide copies to counsel.

16 **DATED** this 21<sup>st</sup> day of July 2010.

17  
18 s/Edward F. Shea  
19 EDWARD F. SHEA  
20 United States District Judge

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